Boston College Law Review

Volume 21
Issue 4 *Number 4*

Article 5

5-1-1980

The Scope of Federal Habeas Corpus Review: Rose v. Mitchell

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The Scope of Federal Habeas Corpus Review: *Rose v. Mitchell* [1]—James E. Mitchell and James Nichols, Jr. were indicted in two counts of first degree murder by the grand jury of Tipton County, Tennessee.[2] Before trial, respondents, both black, filed a plea in abatement with the Tipton County Circuit Court.[3] They sought dismissal of the indictments on the ground that the grand jury array and foreman had been selected in a racially discriminatory manner.[4] After hearing evidence on this question,[5] the judge denied the plea without comment.[6]

Respondents were tried in the Circuit Court of Tipton County before a jury and were convicted on each count of first degree murder.[7] They appealed their convictions to the Tennessee Court of Criminal Appeals where they again attacked the selection process of the grand jury and foreman.[8] In a unanimous decision,[9] the court affirmed the convictions and held that respondents had failed to establish a systematic exclusion of blacks from grand jury service.[10] The Supreme Court of Tennessee denied certiorari.[11]

Respondents sought habeas corpus relief[12] in the United States District Court for the Western District of Tennessee, renewing their claim of dis-

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[1] 443 U.S. 545 (1979).

[2] *Id.* at 547. The grand jury was composed of twelve jurors, including one black woman. Because the regular grand jury foreman was unavailable, the trial judge appointed an acting foreman. Twenty witnesses were scheduled to testify before the grand jury. However, the grand jury unanimously voted to indict after hearing the testimony of one police officer. This witness did not mention respondents' race and this fact was not known to the grand jury or foreman at the time of the indictment. The acting foreman did not vote on the indictment because of the unanimity of the grand jurors, but did sign the indictment as required by TENN. CODE ANN. § 40-1706 (1975). Appendix at 3-35 (1979).

[3] *Id.* at 548. This pre-trial motion was filed *pro se*. *Id.* Counsel was appointed by the county circuit court to represent respondents at the evidentiary hearing on the motion. *Id.* at 549.

[4] *Id.* at 549.

[5] The evidence consisted of the testimony on behalf of the respondents, of three Tipton County jury commissioners, two former grand jury foremen, the current foreman, and eleven of the twelve members of the grand jury which indicted respondents. On behalf of the State, testimony was received from the circuit court clerk of Tipton County. *Id.* at 549.

[6] *Id.* After hearing respondents' evidence, the trial judge stated that "the plea in abatement will be denied." Appendix at 35. This ruling was not accompanied by any written or oral findings of law or fact. The judge subsequently entered a written order which stated in full "the plea in abatement is overruled." Appendix at 36.

[7] 443 U.S. at 549. The evidence at trial consisted of five eyewitnesses who identified respondents as the murderers. A confession by Mitchell was also introduced along with proof that respondents had been in possession of the murder weapons and property stolen from the scene of the crime. The defense relied primarily on the testimonial denial by Nichols of any participation in the murders. Appendix at 38.

[8] 443 U.S. at 549.

[9] Appendix at 39.

[10] 443 U.S. at 549.

[11] *Id.*

[12] As referred to in this note, federal habeas corpus enables a state prisoner to request a federal district court to review the state proceeding which resulted in his conviction on the grounds that he is held in custody in violation of the federal Constitution or laws. The federal court's review is collateral in nature. 28 U.S.C. §§ 2241-

crimination in the selection of the grand jury and its foreman.[13] The case was referred to a magistrate who reviewed respondent's claim in light of the evidence introduced at the state court hearing on the plea in abatement.[14] The magistrate concluded that respondents had presented an unrebutted prima facie case of discrimination in the selection of the grand jury foreman[15] and recommended that the district court conduct an evidentiary hearing on the selection of both the grand jury and its foreman.[16] Upon considering the issue, the district court agreed with the county circuit court's finding that the grand jury had been properly selected, but decided that respondents had shown a prima facie case of discrimination in the selection of the foreman and therefore ordered the State to submit evidence on this issue.[17]

In response, the state offered two affidavits—one from the acting foreman, stating *inter alia* that he had not voted on the indictments of respondents,[18] and another from the judge who appointed the foreman, denying any racial grounds for the appointment.[19] On the basis of these affidavits, the district court dismissed the petitions for habeas corpus.[20] Respondents requested the court to reconsider its ruling,[21] but the court refused, stating that in addition to its original reasons for the dismissal, habeas relief was unavailable because collateral attack on state court convictions was precluded by the United States Supreme Court's decision in *Stone v. Powell*.[22] Respondents

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2254. See text at note 57 *infra*. A similar post-conviction remedy is available to a prisoner held in federal custody under 28 U.S.C. § 2254. Though this parallels habeas corpus review, it is technically not referred to as such. *See, e.g.*, Kaufman v. United States, 394 U.S. 217 (1969).

[13] 443 U.S. at 549. Respondents filed separate petitions for habeas review and the cases were consolidated in the district court. *Id.* at 549; Appendix at 83.

[14] 443 U.S. at 549. Tennessee uses the "key man" system of grand jury selection whereby three jury commissioners are appointed by the trial judge to select a pool of prospective grand jurors from the general population. *Id.* at 548 n.2. TENN. CODE ANN. § 22-223-228 (Supp. 1979). The commissioners meet every two years to select names "from the tax records and permanent registration records of the county or other available and reliable sources." A list of names of "upright and intelligent persons known for their integrity, fair character and sound judgment" are recorded in a jury list book and selected at random for both grand and petit jurors. TENN. CODE ANN. § 22-228. A grand jury consists of twelve grand jurors. TENN. R. CRIM. P. 6 (1979).

A grand jury foreman is selected from the general population and appointed for a two-year term by the trial judge. TENN. CODE ANN. § 40-1506 (Supp. 1978). There is no limitation on reappointment. *Id.* The foreman serves as the "thirteenth" member of the grand jury. *Id.* at § 40-1501.

[15] 443 U.S. at 549-50.

[16] *Id.* at 549.

[17] *Id.* at 550.

[18] Appendix at 105.

[19] Appendix at 113.

[20] 443 U.S. at 550.

[21] Appendix at 124.

[22] Appendix at 125. Stone v. Powell, 428 U.S. 465 (1976). The *Stone* Court held that where the state has provided an opportunity for full and fair litigation of a fourth amendment exclusionary rule claim, federal habeas corpus relief is unavailable. *Id.* at 494. For a discussion of *Stone*, see text at notes 21-27.

appealed to the Court of Appeals for the Sixth Circuit.[23] This court reversed the district court after finding discrimination in the selection of the grand jury foreman.[24] The case was remanded to the Circuit Court of Tipton County with instructions to set aside the convictions and to either reindict respondents within sixty days or release them.[25]

The United States Supreme Court granted certiorari[26] to decide whether a state prisoner may advance a claim of racial discrimination in the appointment of a grand jury foreman in a federal habeas corpus proceeding.[27] Reversing the court of appeals in a plurality decision, the Court HELD: Racial discrimination in the selection of a state grand jury foreman,[28] if proved, is a valid ground for setting aside a state conviction and quashing an indictment,[29] and may be raised on federal habeas corpus review.[30] The Court found, however, as a matter of law, that respondents failed to establish a prima facie case of discrimination with regard to the selection of the grand jury foreman.[31] Accordingly, the Supreme Court upheld the convictions.[32]

The significance of *Rose* lies in the Court's refusal to apply the rule of *Stone v. Powell*[33] to foreclose habeas corpus review of a claim of grand jury discrimination. *Stone* denied habeas relief to claimants who asserted that evidence was introduced at trial contrary to the fourth amendment exclusionary rule where the State has provided an opportunity for full and fair litigation of such claim.[34] Although *Stone* only concerned habeas review of exclusionary rule claims, this decision was thought to signal more general restrictions on the scope of habeas corpus relief.[35] In *Rose,* the Court declined to impose such restrictions and thereby reaffirmed its pre-*Stone* approach to habeas, an approach favoring an expansive scope for habeas review. *Stone* is thus confined to a narrow fourth amendment exception to an otherwise broad scope of review for habeas corpus petitions.

This casenote will examine the expansion of habeas corpus review which the Supreme Court effectively announced in *Rose v. Mitchell.* To accomplish this, the Court's reasoning in *Rose* will first be examined in detail. Second, the casenote will trace the development of federal habeas corpus review of state convictions and analyze the Court's decision in *Stone v. Powell* as it was under-

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[23] 443 U.S. at 550. This appeal was possible because the district judge granted the certificate of probable cause required by FED. R. APP. P. 22 (b). *Id.*

[24] Mitchell v. Rose, 570 F.2d 129, 135 (1978).

[25] *Id.* at 137.

[26] 439 U.S. 816 (1978).

[27] 443 U.S. at 550-51.

[28] The Court also characterized the claim before it as racial discrimination in the selection of *members* of a grand jury. *Id.* at 556. Because a finding of racial discrimination in the selection of a nonvoting foreman is sufficient to set aside the verdict, it is assumed that a similar finding with respect to a voting grand juror would also require the conviction to be set aside. See discussion at note 48 *infra.*

[29] 443 U.S. at 559.

[30] *Id.* at 564.

[31] *Id.* at 574.

[32] *Id.*

[33] 428 U.S. 465.

[34] *Id.* at 494.

[35] See note 110 *infra.*

stood before *Rose*. Finally, the impact of *Rose* on *Stone* will be scrutinized. It will be suggested that the *Rose* decision clarifies the Court's approach to federal habeas corpus review of state claims by considering and explaining the proper interpretation of *Stone v. Powell*.

I. The *Rose* Decision: The Ramifications of *Stone* Rejected

In *Rose* a plurality of the Court concluded that a claim of grand jury discrimination is cognizable on habeas corpus review,[36] but that respondents had failed to establish such discrimination.[37] Writing for the Court, Justice Blackmun first considered whether "a federal court, as a matter of policy, should hear claims of racial discrimination in the selection of a grand jury when reviewing a state conviction."[38] He analyzed the problem in two steps: 1) whether discrimination in the selection of a grand jury or foreman is a valid basis for setting aside a criminal conviction and 2) whether such claims are cognizable on habeas corpus review in light of *Stone v. Powell*.[39]

In addressing the first issue, Justice Blackmun reviewed a long line of decisions, beginning with *Strauder v. West Virginia*.[40] *Strauder* and its progeny,[41] the Court noted, consistently held that the conviction of a black defendant cannot stand when based on an indictment by a grand jury selected in a manner inconsistent with the equal protection clause of the fourteenth amendment.[42] In *Alexander v. Louisiana*,[43] for example, the Court noted that a criminal defendant "is entitled to require that the State not deliberately and

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[36] 443 U. S. at 559.

[37] *Id.* at 574. In *Rose*, seven justices voted to uphold respondents' convictions. They were Justices Blackmun, Brennan, Marshall, Rehnquist, Powell, Stewart, and Chief Justice Burger. Of these seven, four disagreed with Justice Blackmun's treatment of the habeas issue. *Id.* at 547. Justices Powell and Stewart, joined by Justice Rehnquist, concurred in the judgment of the court, but found it unnecessary to reach the merits of petitioners' claim on habeas corpus. *Id.* at 574-88. See text at notes 65-67 *infra*. Although Chief Justice Burger also concurred in the judgment without joining in Justice Blackmun's resolution of the habeas question, he did not file a separate opinion, nor did he join in the aforementioned concurring opinions. *Id.* at 547.

Justice White, joined by Justice Stevens, dissented from the judgment to affirm the convictions on the basis that respondents had established a prima facie case of racial discrimination in the appointment of the grand jury foreman. *Id.* at 588-93. See text at note 70 *infra*. In a separate opinion, Justice Stevens explained his agreement with the court on the habeas corpus issue on the basis of stare decisis. *Id.* at 593-94. Both concurred with Justice Blackmun's analysis of the proper scope of habeas review. Therefore, although *Rose* was a 7-2 decision to uphold the convictions, it was a 5-4 decision to grant habeas review of respondents' claim.

[38] *Id.* at 550.

[39] *Id.* at 550-51.

[40] 100 U.S. 303 (1879).

[41] Neal v. Delaware, 103 U.S. 370 (1880); Bush v. Kentucky, 107 U.S. 110 (1883); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); Reece v. Georgia, 350 U.S. 85 (1955); Alexander v. Louisiana, 405 U.S. 625 (1972); Castenada v. Partida, 430 U.S. 482 (1977). *See also Rose*, 443 U.S. at 550 n.3.

[42] 443 U.S. at 551.

[43] *Id.*, *quoting* Alexander v. Louisiana, 405 U.S. 625, 628 (1972).

systematically deny to members of his race the right to participate as jurors in the administration of justice."[44] The *Rose* Court reasoned that to set aside a conviction where the right to jury participation has been violated is to protect not only the rights of the accused, but to redress the injury caused by such a violation to the administration of justice and to society as a whole.[45] The Court stressed the need to protect the integrity of the judicial process from the taint of racial discrimination and concluded that to permit "challenges to unconstitutional state action by defendants has been and is, the main avenue by which Fourteenth Amendment rights are vindicated in this context."[46]

Having found that discrimination in the selection of a grand jury constitutes a valid ground for setting aside a criminal conviction, the Court next considered whether its decision in *Stone v. Powell* should preclude habeas review of such a claim. In *Stone*, the Court held that habeas relief is generally unavailable to a state prisoner who claims that under the fourth amendment exclusionary rule[47] evidence was improperly admitted at trial. An exception exists, however, where "the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review."[48] The *Rose* Court noted that *Stone* was based on a finding that the exclusionary rule's purpose of deterring unlawful police conduct was not furthered by habeas review of a conviction obtained in a state court and upheld on direct review.[49] Additionally, collateral review of exclusionary rule claims would neither advance an awareness of the values protected by the fourth amendment[50] nor be likely to "reveal flaws in the search or seizure that had gone undetected at trial or on appeal."[51] The *Rose* Court stated that because of these factors, habeas review of fourth amendment claims in *Stone* was foreclosed.

By contrast, however, the *Rose* Court stated that habeas review of a claim of grand jury discrimination may reveal constitutional errors undetected in the state forum.[52] The Court reasoned that "state judges [are] perhaps too close to the day-to-day operation of their system to be able properly to evaluate claims that the system is defective."[53] Collateral review also would achieve an "educative and deterrent effect" because a federal finding of unconstitutionality of the operation of a state's grand jury system would lead to a change in that system.[54]

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[44] *Id.* at 628-29.

[45] 443 U.S. at 556, *quoting* Ballard v. United States, 329 U.S. 187, 195 (1946).

[46] *Id.* at 558.

[47] The exclusionary rule provides for the suppression of evidence obtained through a violation of a defendant's fourth amendment rights where suppression would deter future unlawful police conduct. *See generally* Mapp v. Ohio, 367 U.S. 643 (1961).

[48] 428 U.S. 465, 495 n.37 (1976); *quoted in Rose*, 443 U.S. at 560.

[49] *Id.* at 562.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 563.

[53] *Id.*

[54] *Id.* The Court stated "[t]he educative and deterrent effects of federal review is likely to be great, since the state officials who operate the system, judges or employees of the judiciary, may be expected to take note of a federal court's determination that their procedures are unconstitutional and must be changed." *Id.*

In addition to these factors, the Court recognized that its decision in *Stone* was based in part on its impression that state courts could adequately adjudicate fourth amendment claims and that additional litigation in federal courts would be largely repetitive.[55] The state trial court in *Rose,* however, was itself the target of respondents' claim. Because "the very judge whose conduct respondents challenged decided the validity of that challenge,"[56] the Court concluded that habeas corpus relief was required to provide respondents with a full and fair consideration of their claim.[57] It thereby limited *Stone's* restriction of habeas review to fourth amendment exclusionary rule claims.

Having found that claims of grand jury discrimination are cognizable on habeas corpus, the Court next considered whether respondents had established a prima facie case of discrimination in the selection of the grand jury foreman. The Court found that respondents' evidence was insufficient as a matter of law, to support an inference that the disparity between the number of blacks serving as foreman and the black population in the county was the result of racial discrimination.[58] Since respondents did not sustain their burden of proof they were not entitled to habeas relief and their convictions were upheld.[59]

Four justices did not join in Justice Blackmun's resolution of the habeas issue.[60] Justice Stewart, joined by Justice Rehnquist, found it unnecessary to decide the merits of respondents' claim. He maintained that an indictment, returned by a grand jury that had been selected in a discriminatory manner, does not impugn the fairness of the trial which resulted in the convictions since a properly selected petit jury had to be convinced of respondents' guilt beyond a reasonable doubt.[61] Respondents had not challenged the fairness of their trial, but rather, the constitutionality of the *pre-trial* selection of a grand jury.[62] Justice Stewart also noted the availability of alternative remedies for eradicating discrimination in this context.[63] He concluded that dis-

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[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 565. To make out a prima facie case of discrimination in the selection of a grand jury foreman, respondents were required to show the degree of underrepresentation of blacks" 'by comparing the proportion of the group in the total population to the proportion called to serve as foreman over a significant period of time.' " *Id. quoting* Castaneda v. Partida, 430 U.S. 482, 494 (1977). Respondents relied solely on the testimony of two former and the current foreman of the Tipton County grand jury to attempt to prove underrepresentation. Each foreman testified that he had no knowledge of any black person ever serving as foreman. Respondents did not show that the foremen were knowledgable about any years other than the ones in which they served. There was no other evidence relating to the years during which the foreman did not serve. Additionally, respondents made no direct assertion that no black had ever served for a long period of time, as foreman of the Tipton County grand jury. *Id.* at 566-67.

[59] *Id.* at 574.

[60] See note 28 *supra.*

[61] *Id.* at 574-77.

[62] *Id.*

[63] *Id.* at 578-79. Justice Stewart referred to: 1) the ability of the class discriminated against to obtain injunctive relief; 2) the remedy provided by 18 U.S.C. § 243

crimination in the selection of a grand jury or its foreman is not a sufficient ground for setting aside a conviction on either direct or habeas review.[64] Justice Powell, joined by Justice Rehnquist, also concurred in the judgment of the Court, but would not have granted habeas review of the merits of respondents' claim.[65] He reasoned that respondents received a full and fair opportunity to litigate their claim in the state courts and thus were not entitled to collateral review.[66] As defined by Justice Powell, the writ of habeas corpus is meant to protect the innocent from unjust convictions and should not be employed merely to promote the general societal goal of grand jury integrity or to combat racial discrimination.[67]

Justice White, joined by Justice Stevens, agreed that proof of grand jury discrimination is a valid basis for setting aside a conviction.[68] He also concurred with Justice Blackmun's discussion regarding the scope of habeas review.[69] Justice White dissented, however, on the ground that respondents had established a prima facie case of discrimination in the selection of the grand jury foreman.[70] He therefore would have overturned the convictions.

Thus, a majority of the Court, comprised of Justices Blackmun, White, Stevens, Brennan, and Marshall, concluded that a state prisoner's claim of racial discrimination in the selection of a grand jury foreman is cognizable on federal habeas corpus review. They also agreed that an unrebutted prima facie case of such discrimination requires that the indictment be quashed and the conviction set aside. These justices, however, differed as to whether an unrebutted prima facie case had been established. Consequently, only Justices Blackmun, Brennan, and Marshall voted to affirm the conviction. The remaining four, Justices Stewart, Powell, and Rehnquist and Chief Justice Burger, would have affirmed without reaching the merits of the case on habeas review.

II. The Development of Federal Habeas Corpus Review of State Convictions

Federal habeas corpus[71] is available by way of a statutory grant of jurisdiction which authorizes a federal court to scrutinize both federal and state

(1976) which makes it a criminal offense for a public official to exclude any person from a grand or petit jury for reasons based on race; 3) a defendant's "pre-trial remedies against unlawful indictments." *Id.*

[64] *Id.* at 579.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 586-87.

[68] *Id.* at 588.

[69] *Id.*

[70] *Id.* Justice White reasoned that a showing of a statistical disparity between the number of blacks serving as foreman and the black population in the county may be inappropriate where "the focus of inquiry is a single officeholder whose term lasts two full years. . . ." *Id.* at 591. Rather, the testimony of the three Tipton County foremen and the fact that the selection of a foreman is left to the complete discretion of the county judge was, in Justice White's opinion, sufficient to raise an inference of purposeful discrimination. *Id.* at 592-93.

[71] For an exhaustive account of federal habeas corpus review, see Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963) [hereinafter cited as Bator].

court convictions.[72] Thus, a prisoner who claims that he is held in violation of the Constitution, laws or treaties of the United States is entitled to advance these claims in a federal forum.[73] Because habeas is not defined by statute[74] or the Constitution,[75] the United States Supreme Court has been responsible for delineating the scope of habeas corpus review.[76]

Originally, habeas relief was available only to prisoners held in federal custody,[77] and was limited to a consideration of the trial court's subject matter jurisdiction. For example, in *Ex parte Watkins,*[78] a federal prisoner sought habeas review of his claim that his conviction was based on an indictment which failed to state a federal crime.[79] The Court refused to examine the merits of this claim and held that a judgment by a court of competent jurisdiction may not be tested for error on habeas.[80] In *Ex parte Siebold,*[81] the Court broadened the scope of habeas review without departing from the jurisdictional test set forth in *Watkins.* In *Siebold,* a federal prisoner sought habeas review, arguing that the statute creating the offense for which he was convicted was unconstitutional.[82] The Court held that habeas was available,[83] reasoning that "if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes."[84] Re-emphasizing this jurisdictional requirement, Justice Holmes stated in *Matter of Moran*[85] that a claim of a fifth amendment violation at trial was not cognizable on habeas corpus because even if there was error, "it did not go to the *jurisdiction* of the court."[86]

The nature of habeas corpus was altered once again by the Habeas Corpus Act of 1867[87] which empowered federal courts to grant habeas relief to

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[72] Federal Habeas Corpus Act of 1864, 28 U.S.C. §§ 2241-2255 (1976). Section 2241 (a) (1976) states "writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . ." Section 2255 provides for collateral review of federal convictions and, technically, is not habeas corpus review. However, it provides for essentially the same remedy as that provided by § 2254 for state prisoners and is thus commonly referred to as habeas corpus.

[73] 28 U.S.C. § 2241 (1976).

[74] 28 U.S.C. §§ 2241, 2254, 2255 (1976).

[75] U.S. CONST. article I, § 9, cl. 2.

[76] Ex Parte Stewart, 47 F. Supp. 415 (1942).

[77] Judiciary Act of Sept. 24, 1789, ch. 29, § 14, 1 Stat. 81.

[78] 28 U.S. 200 (1830).

[79] *Id.* at 200.

[80] *Id.* at 202.

[81] 100 U.S. 371 (1879).

[82] *Id.* at 374.

[83] *Id.* at 376.

[84] *Id.* at 377.

[85] 203 U.S. 96 (1906).

[86] *Id.* at 105 (emphasis added). Although the Court, on habeas review, consistently refused to reexamine substantive errors going to the conviction, it did consider alleged illegality in sentencing. For example, in the case of In re Snow, 120 U.S. 274 (1887) the Court decided that where the indictment charged only one offense, the imposition of consecutive sentences therefor was unconstitutional. *Id.* at 284-85. Accordingly, the habeas petitioner was released after serving the legal portion of the sentence. *See* Ex parte Parks, 93 U.S. 10 (1876); Ex parte Yarbrough, 110 U.S. 651 (1884).

[87] Judiciary Act of Feb. 5, 1867, ch. 28, § I, 14 Stat. 384, codified in 28 U.S.C. § 2241 (1976).

state prisoners. The Act stated that federal courts "in addition to the authority already conferred by law shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. . . ."[88] Although the statute also prescribed the procedure to be followed on habeas, it left the Court free to develop the substantive scope of habeas review of state claims and to impose any other limitations not inconsistent with the Act.[89] Due to concerns of comity and federalism, the Supreme Court developed the doctrine of exhaustion of state remedies with regard to state prisoners seeking federal habeas review. In *Ex parte Royall*,[90] a state petitioner, awaiting trial, sought habeas review of his claim that the statute under which he was charged was unconstitutional.[91] Although the issue was considered "jurisdictional" and therefore cognizable on habeas review, the Court denied relief. It held that as a matter of discretion, and in the absence of extraordinary circumstances, a federal court should not assert habeas jurisdiction before the state trial court has decided the otherwise cognizable federal questions at issue.[92] In subsequent cases, the Court determined that a state claimant must also pursue state appellate and post-conviction procedures and petition for a writ of error[93] with the Supreme Court before seeking habeas review.[94]

With the exception of the exhaustion of state remedies requirement, the substantive scope of habeas review was identical for both state and federal prisoners. Accordingly, in the case of *In re Wood*,[95] the Court refused to grant habeas review of a state prisoner's claim that he had been indicted by a grand jury selected in a racially discriminatory manner.[96] While it acknowledged that such selection procedures would violate the Constitution, the Court reasoned that the issue did not affect the trial court's jurisdiction.[97] Thus, at this stage in its development, habeas corpus was available to examine the jurisdiction of a state or federal court, including the constitutionality of a statute.

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[88] *Id.*

[89] *Id. See also* Bator, *supra* note 71, at 474-77.

[90] 117 U.S. 241 (1836).

[91] *Id.* at 245.

[92] *Id.* at 253.

[93] The function of the Writ of Error is to bring a judgment of an inferior court before a higher court with appellate jurisdiction for purpose of review on questions of law. MOORE, MOORE'S FEDERAL PRACTICE § 60.14 (1975).

[94] *See, e.g.*, Ex parte Fonda, 117 U.S. 516 (1886); In re Duncan, 139 U.S. 449 (1891) (failure to exhaust state appellate procedures); Pepke v. Cronan, 155 U.S. 100 (1894) (failure to exhaust state post-conviction remedies); In re Frederich, 149 U.S. 70 (1893) (failure to seek writ of error in the U.S. Supreme Court). The exhaustion of state remedies requirement is not inflexible, yielding always to exceptional circumstances. For instance, *see* Bowen v. Johnston, 306 U.S. 19, 27 (1939); Fay v. Noia, 372 U.S. 391, 426 (1963). The Court in *Fay* allowed, as a matter of limited discretion, habeas review of a state prisoner's claim that his conviction was based on a coerced confession, where the claimant had not exhausted state remedies because his co-defendants had successfully appealed to reverse similar convictions. *Id.* at 438.

[95] 140 U.S. 278 (1891).

[96] *Id.* at 289.

[97] *Id.* at 285-86.

This interpretation of the scope of habeas corpus remained fundamentally unchanged until 1915, when the Supreme Court decided the landmark case of *Frank v. Mangum*.[98] Frank was convicted of murder and sentenced to death by the Superior Court of Fulton County, Georgia. He petitioned for a new trial, claiming that his trial had been dominated by a mob which biased the judge and jury. The petition was denied and Frank appealed to the Supreme Court of Georgia.[99] That Court made an extensive inquiry into the matter before finding that Frank had received a fair trial.[100] After pursuing state post-conviction procedures[101] and petitioning unsuccessfully for a writ of error by the United States Supreme Court,[102] Frank sought habeas relief in the federal district court. The district court denied habeas review[103] and the Supreme Court affirmed.[104]

The Court stated that if a mob were to intimidate a judge and jury so as to actually interfere with the course of justice, the result would be "a departure from due process of law."[105] Whether a mob did in fact interfere with the trial, however, was a question that could be adequately and finally adjudicated by the state appellate courts.[106] The Court therefore determined that a full and fair litigation of federal questions through state appellate review was sufficient to satisfy the "due process" requirement.[107] Although it denied relief, the Court expanded the scope of habeas review by holding that where an opportunity for adequate appellate or "corrective" process is not provided to the claimant, a court on habeas could inquire into the merits of a claim, whether or not the claim was "jurisdictional" in nature.[108] Thus, the *Frank* Court broadened the scope of habeas review by making it available to both jurisdictional and nonjurisdictional claims as long as such claims had not previously been fully and fairly litigated in the state forum.

There was no further change in the scope of habeas review until the Supreme Court's 1953 decision in *Brown v. Allen*.[109] Brown was convicted of rape and sentenced to death by a North Carolina court. He appealed his conviction, to the state supreme court, claiming it was based on the admission of a coerced confession prohibited by the fifth amendment. He also claimed ra-

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[98] 237 U.S. 309 (1915).

[99] Frank v. State, 141 Ga. 243, 280, 80 S.E. 1016, 1034 (1914).

[100] *Id.*

[101] The trial court denied a motion for a new trial on the ground of newly discovered evidence and this action was affirmed by the state supreme court, Frank v. State, 83 S.E. 233 (Ga. 1914). Frank next filed a motion with the superior court to set aside the verdict, claiming *inter alia* that his absence from the courtroom when the verdict was rendered was involuntary, and that this vitiated the result. The State interposed a demurrer which the superior court sustained. Once again, the state supreme court affirmed, 83 S.E. 645 (Ga. 1914).

[102] In the Matter of Frank, 235 U.S. 694 (1914).

[103] The opinion of the district court is unreported. *See* 237 U.S. at 311.

[104] 237 U.S. at 345 (1915).

[105] *Id.* at 335.

[106] *Id.*

[107] *Id.* at 335-37.

[108] *Id.* at 327.

[109] 344 U. S. 443 (1953).

cial discrimination in the selection of grand and petit juries prohibited by the fourteenth amendment. These claims were fully litigated in the trial court and again in the state supreme court which affirmed the conviction.[110] Certiorari was denied[111] and Brown sought federal habeas corpus.[112] The district court denied habeas review without a hearing[113] and the court of appeals affirmed.[114]

The Supreme Court granted certiorari[115] and affirmed the conviction.[116] The Court did not rely on *Frank v. Mangum*,[117] to avoid reaching the merits on habeas by finding that the state had provided adequate corrective process. Rather, the Court examined the merits of Brown's claims which had been fully litigated in the state courts.[118] In so doing, the Court abandoned the *Frank* limitation that habeas would *not* be available to review claims which had already been adequately litigated. The *Brown* Court, however, did not discuss its reason for expanding the scope of review beyond the bounds set forth in *Frank*. Eight of the nine justices seemed to assume *sub silentio* that federal courts have the power to review the merits of constitutional claims previously adjudicated in the state forum.[119] The Court also indicated that a district court judge could, as a matter of discretion, disregard the state's finding of facts regardless of the adequacy of such findings.[120] Thus, without explaining why, the Court made habeas review available to all claims regardless of the adequacy of prior proceedings and left the district court free to make its own fact findings. The Court's rationale for the *Brown* decision remained unarticulated in subsequent decisions, as the Court continued to rely on its assumption that habeas relief is available to a state prisoner notwithstanding a full and fair litigation of federal questions by the state courts.[121] Although *Brown* was criticized,[122] it remained intact until *Stone v. Powell*.

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[110] State v. Brown, 233 N.C. 202, 63 S.E.2d 99 (1951).

[111] 341 U.S. 943 (1951).

[112] 98 F. Supp. 886 (E.D.N.C. 1951).

[113] *Id.*

[114] 192 F.2d 477 (4th Cir. 1951).

[115] 343 U.S. 903 (1952).

[116] 344 U.S. at 487.

[117] 237 U.S. 309 (1915).

[118] 344 U.S. at 465-87.

[119] *See* J. Frankfurter's dissenting opinion in *Brown*, 344 U.S. at 497-512. *See also* Bator, *supra* note 71, at 500-07.

[120] 344 U.S. at 463-64, 478.

[121] *See e.g.*, Irvin v. Dowd, 366 U.S. 717 (1961); United States ex rel. Jennings v. Ragen, 358 U.S. 276 (1959); Thomas v. Arizona, 356 U.S. 390 (1958).

[122] *See* Mackey v. United States, 401 U.S. 667, 683-85 (1971) (Harlan, J., concurring and dissenting). Justice Harlan characterized *Brown* as an "unsound extension of the historic scope of the writ and an unfortunate display of insensitivity to the principles of federalism which underlie the American legal system." *Id.* at 685. *See also* Bator *supra* note 71, at 499-528. Bator characterizes the *Brown* decision as "unresponsive to (and even subversive of) what should be our central aim: encouraging reform and improvement in state criminal procedures." *Id.* at 525.

III. The Rationale of *Stone v. Powell*

In *Stone v. Powell*,[123] a state prisoner sought federal habeas corpus review of his claim that evidence obtained in violation of the fourth amendment was improperly introduced at trial.[124] The issue was whether fourth amendment claims are cognizable on habeas corpus review.[125] The Court held that where the state has provided an opportunity for full and fair litigation of a claim under the fourth amendment, the Constitution does not require that it be reviewed by a federal court on petition for habeas review.[126]

Writing for the majority, Justice Powell characterized the exclusionary rule as a "judicially created means of effectuating the rights secured by the Fourth Amendment,"[127] rather than a personal constitutional right.[128] Application of the rule in this context results in the suppression of evidence obtained through an unconstitutional search or seizure.[129] Traditionally, the exclusion of such evidence was thought to preserve the integrity of the judicial process as well as to deter unlawful police conduct.[130] Noting that illegally obtained evidence can be used both in grand jury proceedings and to impeach the defendant, Justice Powell reasoned that judicial integrity was not in itself sufficient to justify the "exclusion of highly probative evidence."[131] Therefore, the Court maintained that the primary rationale behind the exclusionary rule is to deter police misconduct and thus assure protection of individual privacy and security in society.[132]

Having defined the underlying purpose of the exclusionary rule, the Court next considered whether a prisoner, who has been afforded the opportunity of full and fair litigation of his claim in the state courts, may obtain federal habeas corpus review.[133] To make this determination, the Court weighed "the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims."[134] It observed that habeas review of such claims would not augment the protections afforded by the fourth amendment or reveal flaws in the search and seizure not discovered by the state courts.[135] Therefore, the Court concluded that the exclusionary rule's aim of deterring unlawful police conduct would not be

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[123] 428 U.S. 465 (1976).

[124] *Id.* at 468-69. See note 47 *supra* (explanation of the exclusionary rule).

[125] *Id.* at 469.

[126] *Id.* at 481-82.

[127] *Id.* at 482.

[128] *Id.* at 486.

[129] *See generally* Weeks v. United States, 232 U.S. 383 (1914), and Gouled v. United States, 255 U.S. 298 (1921). The exclusionary rule was held constitutionally binding on the states in Mapp v. Ohio, 367 U.S. 643 (1961).

[130] See note 47 *supra*, Elkins v. United States, 364 U.S. 206, 217-24 (1960), Terry v. Ohio, 392 U.S. 1, 12-13 (1968).

[131] 428 U.S. at 485.

[132] *Id.* at 486.

[133] *Id.* at 489.

[134] *Id.*

[135] *Id.* at 493.

advanced significantly by reviewing such claims on habeas corpus where a full and fair state adjudication had been available.[136]

On its face, *Stone* appears to be a relatively straightforward decision. To reach its conclusion, the Court merely balanced the costs of granting habeas review of exclusionary rule claims against the concurrent benefits to be derived[137] if such review were granted. The Court, however, made several comments in footnotes which would indicate that the rationale of *Stone* was not intended to apply solely to fourth amendment exclusionary rule claims, but rather to other constitutional claims raised by habeas petitioners as well.[138] Moreover, Justice Brennan, dissenting in *Stone*, accused the Court of setting forth a spurious rationale for its decision. He said

> the real ground of today's decision—a ground that is particularly troubling in light of its portent for habeas jurisdiction generally—is the Court's novel reinterpretation of the habeas statutes. . . .[139] Much in the Court's opinion suggests that a construction of the haabeas statutes to deny relief for non-"guilt-related" constitutional violations, based on this Court's vague notions of comity and federalism, is the actual premise for today's decision, and although the Court attempts to bury its underlying premises in footnotes, those premises mark this case as a harbinger of future eviscerations of the habeas statutes that plainly does violence to congressional power to frame the statutory contours of habeas jurisdictions.[140]

Justice Brennan's observation was not undeserved. The Court's remarks generated some confusion[141] which may have prompted the Court's discussion of the scope of habeas review in *Rose v. Mitchell*. Therefore, a close examination of these comments in *Stone* is essential to an understanding of both *Stone* and *Rose*.

In a footnote to its opinion, the *Stone* Court stated that because the writ of habeas corpus is equitable in nature, the Court has discretion in deciding whether to issue it.[142] It noted too, that "[r]esort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in intrusion on values important to our system of government."[143] These values include " '(i) the most effective utiliza-

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[136] *Id.* at 493-94.

[137] *Id.* at 489-96.

[138] *See* 428 U.S. at 478 n.11, 483, n.19, 491, nn.30, 31, 34.

[139] *Id.* at 515.

[140] *Id.* at 516 (footnote omitted).

[141] *See* Robbins and Sanders, *Judicial Integrity, the Appearance of Justice, and the Great Writ of Habeas Corpus: How to Kill Two Thirds (or More) with One Stone*, 15 AM. CRIM. L. REV. 63 (1977); Kelley, *Preferred Rights and Strict Scrutiny in the Law of Habeas Corpus*, 9 U. TOL. L. REV. 754 (1978); Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473 (1978); Comment, *The "Opportunity" Test of Stone v. Powell: Toward a Redefinition of Federal Habeas Corpus*, 23 VILL. L. REV. 1095 (1978).

[142] 428 U.S. at 478 n. 11. The Court quoted its statement in Fay v. Noia, 372 U.S. 391, 438 (1961) that " '[d]iscretion is implicit' " in the requirement of 28 U.S.C. § 2243 that the judge " 'dispose of the matter as law and justice require.' " *Id.*

[143] *Id.* at 491 n.31.

tion of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federation is founded.'"[144] In the Court's view, the cost of infringing these values incurred upon habeas review of exclusionary rule claims are not outweighed by the benefits of such review. Furthering the underlying purpose of the fourth amendment is simply more important.[145] Therefore, because these values would be jeopardized by habeas review of exclusionary rule claims, habeas would no longer be available in this context. Moreover, the Court implied that should these values be infringed in circumstances not involving the fourth amendment, a judge would have the discretion to foreclose habeas review.[146]

In addition to the protection of these values, the Court set forth another reason militating against habeas review of exclusionary rule claims. The Court described habeas corpus as "an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty."[147] As such, habeas review need not be available to redress fourth amendment exclusionary rule claims since "in the case of a typical Fourth Amendment claim, asserted on collateral attack, a convicted defendant is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration."[148] The Court implied that where a state prisoner has been found guilty, a federal court on habeas has the discretion to deny review of those claims not related to the determination of guilt or innocence. This in turn suggests that to raise such a claim, the habeas petitioner must assert a colorable claim of innocence or at least assert actual prejudice constituting error in the fact-finding process.[149]

Although this approach to habeas corpus has been advocated by some legal scholars,[150] the Court's apparent limiting of habeas corpus review to the trial's fact-finding process marked a departure from its pre-*Stone* position. Habeas review had previously been understood as enabling a federal court to examine the overall legality of the prisoner's detention, including all procedural and substantive requirements of due process.[151] Thus, the Court in *Stone* seemed to narrow its prior perception of habeas by confining collateral review to claims concerning the trial's determination of facts.

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[144] *Id.* at 491 n.31, *quoting* Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

[145] 428 U.S. at 491 n.31.

[146] *Id.*

[147] *Id.*

[148] *Id.* By "basic justice", the Court meant the issue of whether an *innocent* man would "suffer an unconstitutional loss of liberty." *Id.* Thus, a *guilty* person's fourth amendment claim would not implicate the "basic justice of his incarceration" since "basic justice" entails the incarceration of guilty persons.

[149] *Id.* at 478 n.11, 483, n.19, 491 n.30, *quoting* Oaks, *Ethics, Morality and Professional Responsibility*, 1975 B.Y.U. L. Rev. 591, 596 & n.31.

[150] *See, e.g.*, Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970), and Bator, *supra* note 71.

[151] *See, e.g.*, Fay v. Noia, 372 U.S. 391, 402 (1963).

Another source of confusion in *Stone* was the Court's apparent overruling of *Brown v. Allen*.[152] In *Brown*, the Court held that a state prisoner could obtain federal habeas corpus review of his federal claims *regardless* of the adequacy of the State's adjudication of such claims.[153] The *Brown* Court thus broadened the scope of habeas review by abandoning the *Frank v. Magnum* requirement that habeas be available only where the state's "corrective process" was inadequate. It has been suggested that the expansion of habeas review in *Brown* was the product of the Court's dissatisfaction with the state courts' treatment of federal constitutional issues.[154] By holding that a full and fair opportunity to litigate an exclusionary rule claim in the state courts would preclude federal habeas relief, the *Stone* Court exhibited a willingness to return to its pre-*Brown* position with regard to the scope of review. The Court's emphasis on the adequacy of state proceedings echoed its holding in *Frank v. Magnum*[155] restricting habeas to those claims not fully and fairly adjudicated in the state forum.[156] That a state court could resolve a federal claim competently and with finality is reflected in the *Stone* Court's refusal to "assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. . . . [T]here is no 'intrinsic reason why the fact that a man is a federal judge should make him more competant or conscientous or learned . . . than his neighbor in the state courthouse.' "[157] In sum, a broad reading of *Stone* reveals that two major changes in the scope of federal habeas corpus review appeared to be effected. First, claims unrelated to the determination of guilt seemed no longer cognizable on habeas review. Second, where a claim otherwise cognizable on habeas had been fully and fairly adjudicated by a state tribunal, it would not be reexamined by a federal court.[158]

IV. The Aftermath of *Stone*

That *Stone* was intended to be read broadly to restrict the scope of federal habeas review of claims other than those involving the fourth amendment was evidenced by references to *Stone* in subsequent Supreme Court cases. Justice Brennan, who dissented vehemently in *Stone*, continued his attack on that decision in *Juidice v. Vail*.[159] Dissenting in *Vail*, Justice Brennan maintained that *Stone* was more than just the product of the Court's dissatisfaction with the exclusionary rule.[160] Rather, in his view, *Stone* "so circumscribed the centuries-old remedy of habeas corpus as to weaken drastically the federal courts' ability to safeguard individuals from unconstitutional imprison-

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[152] 344 U.S. 443 (1953). See text at notes 84-94.

[153] *Id.*

[154] Bator, *supra* note 71.

[155] 237 U.S. 309 (1915). See text at notes 77-83.

[156] 237 U.S. at 327.

[157] 428 U.S. at 493 n.35, *quoting* Bator, *supra*, note 71 at 509.

[158] The Court's language is unclear as to whether these changes are mandatory. See *Stone*, 428 U.S. at 478 n.11. At a minimum, it seemed to provide for a federal court's discretionary refusal to issue the writ under such circumstances. *Id.*

[159] 430 U.S. 327 (1977).

[160] *Id.* at 346.

ment."[161] At a glance, this remark might be understood as flowing from Justice Brennan's perception of the exclusionary rule as intrinsic to the fourth amendment, and thus a matter of constitutional magnitude rather than merely a judicially created remedy. He went on to say, however, that *Stone*, as one of several decisions "rendered in the name of federalism"[162] and grounded in "vague, undefined notions of equity, comity and federalism,"[163] exemplifies the Court's effort to limit the protective role of the federal judiciary by entrusting the state courts with the protection of individual rights.[164] These comments suggest that Justice Brennan anticipated that the Court would continue to foreclose habeas review of non-fourth amendment claims which were not related to the fact-finding process and which could be adequately adjudicated in a state forum.

Justice Brennan's reading of *Stone* was supported by Chief Justice Burger's dissent in *Brewer v. Williams*.[165] Referring to a defendant's sixth amendment right to counsel, and possibly to the fifth amendment privilege against self incrimination,[166] the Chief Justice stated that he would not allow a defendant to collaterally attack his conviction unless the alleged constitutional error related to the integrity of the fact-finding process and supported a colorable claim of innocence.[167] Thus, he would not have reached the merits of the case on habeas since petitioner's sixth amendment claim did not relate to the question of guilt. Chief Justice Burger also expressed his dismay that Justice Powell, who wrote for the majority in *Stone*, joined in the *Brewer* majority's habeas corpus review of the respondent's sixth amendment claim rather than remand the case for reconsideration in light of *Stone*.[168] Clearly, the Chief Justice, like Justice Brennan, understood *Stone* as not just an exclusionary rule case, but as portending further limitations on the scope of federal habeas corpus review.

Justice Powell's refusal to seek reconsideration of *Brewer* in light of *Stone* may be explained by reference to his comments in *Stone*. There, Justice Powell stated that, unlike a fourth amendment violation, a fifth or sixth amendment violation might impugn the integrity of the fact-finding process so as to be cognizable on habeas review.[169] Therefore, Justice Powell's position in *Brewer* did not signal a departure from his reasoning in *Stone*. Rather,

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[161] *Id.*

[162] *Id.*

[163] *Id.* In addition to *Stone*, Justice Brennan cited Francis v. Henderson, 425 U.S. 536 (1976) (with regard to habeas corpus); Rizzo v. Goode, 423 U.S. 362 (1976); and Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) (with regard to actions brought under 42 U.S.C. § 1983).

[164] 430 U.S. 327, 346.

[165] 430 U.S. 387 (1977).

[166] Respondent in *Brewer* claimed that his fifth and sixth amendment rights had been violated. However, the Court concluded that it only needed to consider the sixth amendment issue. *Id.* at 397-98. The majority did not consider whether fifth or sixth amendment claims might not be cognizable on habeas.

[167] *Id.* at 428-29, *quoting* Kaufman v. United States, 394 U.S. 217, 240-42 (1969) (Black, J. dissenting).

[168] *Id.* at 428.

[169] 428 U.S. at 479.

he differed from Chief Justice Burger only with regard to the effect of a fifth or sixth amendment violation on the integrity of the fact-finding process. Justice Powell's adherence to *Stone* is further evidenced by his remarks in *Castaneda v. Partida*,[170] decided on the same day as *Brewer*.[171] In *Castaneda*, the respondent was convicted of a crime in a state court and claimed on habeas review that the grand jury that indicted him had been selected in a discriminatory manner. Respondent, a Mexican-American, based this claim on the gross underrepresentation of Mexican-Americans on the county grand juries.[172] The Court held that respondent had offered sufficient proof to establish a *prima facie* case of intentional discrimination which the State had failed to rebut.[173] Dissenting on the ground that the evidence did not support a *prima facie* case of discrimination,[174] Justice Powell commented that

> [a] strong case may be made that claims of grand jury discrimination are not cognizable on habeas corpus review after *Stone v. Powell* . . . . [T]he prisoner in this case challenges only the now moot determination by the grand jury that there was sufficient cause to proceed to trial. He points to no flaw in the trial itself.[175]

This issue was not addressed by the Court since it was not argued by counsel.[176] Yet, Justice Powell did indicate that, given the opportunity, he would exclude claims of discrimination in grand juror selection from the scope of habeas review where the claim had been fully and fairly litigated in the state courts.[177] It was this same view that he advanced in his concurring opinion in *Rose v. Mitchell*.[178]

Thus, prior to *Rose*, there was some uncertainty among the members of the Court as to how the scope of habeas review of state claims had been altered. Several Justices interpreted *Stone* as precluding habeas review of state claims unrelated to the issue of guilt and the trial's determination of fact. Others saw that decision as pertaining solely to habeas review of fourth amendment exclusionary rule claims. *Rose*, then, was a chance for the court to clarify its position as to the proper scope of state claims.

V. The Impact of *Rose* on *Stone v. Powell*

Rose v. Mitchell presented the Court with an opportunity to further limit the availability of habeas review. The only claim in *Rose* was whether racial

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[170] 430 U.S. 428, 507-18 (1977) (Powell, J., dissenting).

[171] *Castaneda* and *Brewer* were decided on March 23, 1977.

[172] 430 U.S. at 485-92.

[173] *Id.* at 492-501.

[174] *Id.* at 507-18 (Powell, J., dissenting).

[175] *Id.* at 508 n.1.

[176] "But as this issue was not addressed below and was not briefed or argued in this Court, it would be inappropriate to resolve it in this case." *Id.*

[177] *Id.* The aforementioned interpretations of *Stone* were not the only indicators of further changes in the scope of federal habeas corpus review. Justice Blackmun, writing for the Court in *Rose*, stated that Justice Powell's opinion in *Castaneda* was supported by Chief Justice Burger, Justice Rehnquist and, perhaps inferentially, Justice Stewart. 443 U.S. at 559.

[178] 443 U.S. at 579 (Powell, J., concurring). See text at note 65 *supra*.

discrimination in the selection of a grand jury foreman who did not vote on the indictment was cognizable on habeas corpus review. This claim in no way related to the integrity of the trial court's fact-finding process, nor was there any showing of a colorable claim of innocence or actual prejudice to respondents. Moreover, the claim of discrimination had been adjudicated on state appellate review. Accordingly, to follow *Stone*, an alleged fourteenth amendment violation in the selection of the foreman should not have been cognizable on federal habeas review where the claim had been adequately litigated in the state forum. Nonetheless, the *Rose* Court refused to apply the *Stone* rule and restrict the scope of habeas review of state court convictions. Although *Stone* was not overturned, the *Rose* majority narrowly construed that decision, leaving it in effect as only a very limited exception to an otherwise broad scope of heabeas review.

The *Rose* Court first attempted to distinguish *Stone* by describing the exclusionary rule as a "judicially created" remedy rather than a constitutional right under the fourth amendment.[179] The Court reaffirmed its finding in *Stone* that the benefits of applying this rule on habeas review are outweighed by the attendant costs of doing so,[180] but only insofar as that finding was based on a judicial remedy theory. Accordingly, with regard to *constitutional* claims rather than judicially created devices, habeas would continue to be available. The Court observed that "a claim of discrimination differs so fundamentally from application on habeas of the Fourth Amendment exclusionary rule that the reasoning of *Stone v. Powell* should not be extended to foreclose habeas review of such claims in federal court."[181]

In addition to limiting *Stone* to a non-constitutional, judicially created remedy, the *Rose* Court mentioned two other "fundamental differences between the claim here at issue and the claim at issue in *Stone v. Powell*."[182] In the case of a fourth amendment violation, the trial court is asked to determine whether the police acted illegally, and, if so, whether the suppression of evidence obtained as a result of such conduct would deter similar behavior in the future.[183] In *Rose* the trial court was in the peculiar position of having to determine whether the means of grand jury selection, in which it had participated, was constitutional. Thus, while the integrity of the judiciary was not challenged with regard to fourth amendment claims at issue in *Stone*, the state trial court itself was the focus of the challenge in *Rose*, bringing "the integrity of the judicial system into direct question."[184]

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[179] *Id.* at 560, 562.

[180] *Id.* at 562-63.

[181] *Id.* at 560-61. For purposes of habeas review, the *Rose* Court's differentiation between the exclusionary rule as a judicial remedy and the fourth amendment as a constitutional right is unsound. Regardless of how the Court characterizes the exclusionary rule, its refusal to allow collateral review of such claims precludes a habeas petitioner from obtaining relief for a fourth amendment violation. Indeed, the Court itself has referred to *Stone* as "removing from the purview of a federal habeas court challenges *resting on the Fourth Amendment*, where there has been a full and fair opportunity to raise them in the state court." Wainwright v. Sykes, 433 U.S. 72, 78-80 (1977) (emphasis added).

[182] 443 U.S. at 561.

[183] Stone v. Powell, 428 U.S. 465, 492 (1976).

[184] 443 U.S. at 563.

The *Rose* Court also concentrated on the type and degree of harm that results from a fourteenth amendment violation as opposed to a fourth amendment violation or a misapplication of the exclusionary rule.[185] In the latter case, the harm is to the individual against whom illegally obtained evidence is admitted. In the context of the fourteenth amendment, the harm is not only to the individual, but also to society as a whole. "The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve," the Court stated, "impairs the confidence of the public in the administration of justice."[186]

Of these two aspects mentioned by the *Rose* Court, the more curious statement is the observation that the trial court was incapable of resolving a claim of grand jury discrimination due to its own involvement in the selection process. The Court concluded that since the trial court was thus unable to resolve the issue, "[a] federal forum must be available if a full and fair hearing of such claims is to be had."[187] This language might be interpreted to indicate the Court's adherence to *Stone's* apparent restriction of federal review to those claims not adequately litigated in the state forum. In *Rose*, however, absolutely no mention is made of state appellate review of challenges to a trial court's conduct. The Court does not state whether the involvement of the trial court in a fourteenth amendment violation so taints the entirety of a state's judicial process as to render the state court of appeals incapable of resolving such a claim. Thus, by failing to address the adequacy of state appellate or corrective process, the Court suggests a return to the expansive scope of federal habeas review set forth in *Brown*.[188] Under *Brown*, any constitutional claim was cognizable on habeas regardless of the adequacy of a state's corrective process.[189]

As a third and final reason for distinguishing *Stone* from *Rose* the Court emphasized that habeas is available not only to protect the rights of the individual but also to advance more general societal goals, such as the preserva-

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[185] *Id.* at 564.

[186] *Id.* at 556.

[187] *Id.* at 561.

[188] *Id.* 344 U.S. 443. See text at notes 84-94 *supra*.

[189] See text at note 84 *infra*. That the Court is not willing to entrust the state courts with the final resolution of other constitutional claims is indicated not only in *Rose*, but in *Jackson v. Virginia*, 443 U.S. 323 (1979) where the Court states:

> The federal habeas corpus statute presumes the norm of a fair trial in the state court and adequate state post-conviction remedies to redress possible error. What it does not presume is that these state proceedings will always be without error in the constitutional sense. The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur—reflecting as it does the belief that the 'finality' of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right—is not one that can be so lightly abjured.

Id. This statement, read in conjunction with *Rose*, makes it clear that habeas corpus remains available to litigate all constitutional claims, and is foreclosed only with regard to non-constitutional fourth amendment exclusionary rule claims.

tion of judicial integrity and the denigration of racial discrimination,[190] the Court observed:

> [T]he constitutional interests that a federal court adjudicating a claim on habeas of grand jury discrimination seeks to vindicate are substantially more compelling than those at issue in *Stone* . . . discrimination on account of race in the administration of justice strikes at the core concerns of the Fourteenth Amendment and at fundamental values of our society and our legal system. Where discrimination that is "at war with our basic concepts of a democratic society and a representative government". . . infects the legal system, the strong interest in making available federal habeas corpus relief outweighs the costs associated with such relief.[191]

By distinguishing *Stone* on this basis, the Court implies that societal goals of similar import would not be advanced by habeas review of fourth amendment exclusionary rule claims where the claimant had a full and fair opportunity to litigate the matter in the state forum. By allowing habeas to be used as a vehicle to further *societal* goals, the Court has taken a giant step away from the "basic justice" defined in terms of the *individual* in Stone[192] and demonstrated its willingness to make habeas available at great cost.

CONCLUSION

Prior to *Rose*, a broad reading of *Stone* indicated that the Court appeared to have made two major changes in the scope of federal habeas corpus review of state claims, both of which would initiate a retreat from *Brown*. The first change was the requirement that, to be cognizable on habeas, the claim must be related to the trial's fact-finding process. The second required that otherwise cognizable claims would not be reviewed if fully and fairly litigated by the state trial and appellate courts. In *Rose*, the Court clearly stated that it did not intend to restrict habeas review to trial-related claims as had been suggested by *Stone*. This, coupled with the Court's limitation of the adequate state process requirement to exclusionary rule claims evidences a revitalization of *Brown's* expansive scope of habeas review.[193]

It would appear that the outcome of each case is the product of the Court's definition of the purposes of habeas corpus review. While *Stone* signalled a narrowing in the definition, *Rose* heralded a renewal of the broad scope of review announced in *Brown* over twenty years ago. Traditionally, consistency in this area of the law has been elusive. Almost ten years ago, Justice Harlan stated that:

> present habeas corpus decisions provide little assistance in fathoming the underlying understanding of habeas corpus upon which these decisions have been premised. The short of the matter is that this

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[190] 443 U.S. at 563-64.
[191] *Id.* at 564.
[192] 428 U.S. 465, 491 n.31 (1976). See note 116 *supra*.
[193] See text & note at note 110 *supra*.

> Court has in recent times yet to produce any considered, coherent statement of the general purposes of habeas.[194]

By effectively reversing much of *Stone* and reaffirming *Brown*, the Court has taken a beginning step towards developing a "considered" and "coherent" approach to habeas corpus. It is unlikely that the Court again will restrict the scope of habeas review as it did in *Stone* after refusing in *Rose* to exclude from the purview of habeas a claim of discrimination in the selection of a non-voting grand jury foreman, a claim which, if proved, would have had no impact on the fairness of the trial and for which alternative remedies exist.

MARY ANN CHIRBA-MARTIN

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[194] Mackey v. United States, 401 U.S. 667, 685 (1971) (Harlan, J., concurring).